JOSEPH TOMALINO
AUGUST SOBOTKA

IBLA 70-44 Decided August 16, 1979

Appeal from a decision of the Chief, Division of Cadastral Survey, Bureau of Land Management, dismissing appellants' protest against a proposed public land survey. Objections to the recommended decision of Administrative Law Judge Sweitzer.

Affirmed; objections overruled.

1. Public Lands: Disposals of: Generally -- Surveys of Public Lands: Generally --

An error in omitting to survey an island in a navigable stream does not divest the United States of title or interpose any obstacle to surveying it at a later time. An island within the public domain in a navigable stream and actually in existence both at the time of the survey of the banks of the stream and also upon the admission to the Union of the State within which it is situated remains the property of the United States. Even though omitted from survey, such land does not become part of the fractional subdivisions on the opposite banks of the stream.

2. Public Lands: Disposals of: Generally -- Public Records -- State Taxes

Public lands owned by the United States cannot be subjected to taxation by the state in which they are located. When Congress has prescribed the conditions upon which portions of the public domain may be alienated and has provided that upon fulfillment of certain conditions the United States shall

> issue patent, the land becomes taxable only after the applicant has fulfilled all conditions precedent to such conveyance. Payment of taxes to a state for Federal land does not afford the taxpayer any rights against the United States, unless specifically provided by a Federal statute.

APPEARANCES: John R. Carr, Esq., Miles City, Montana, for appellants; Edward F. Bartlett, Esq., Office of the Solicitor, U.S. Department of the Interior, Billings, Montana.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

August Sobotka and Joseph Tomalino appeal from a decision of March 20, 1969, by which the Chief, Division of Cadastral Survey, Bureau of Land Management (BLM), dismissed their protest of a proposed public land survey of a landform in secs. 20 and 21, T. 18 N., R. 57 E., principal meridian, Group No. 543, Montana. This dismissal was based upon a finding by the Chief that the landform was in existence as an island in the Yellowstone River in 1889, the year of Montana's admission to the Union.

By order of August 18, 1971, the Board remanded this case to the Hearings Division, Office of Hearings and Appeals, for a hearing at which appellants would have "the burden of showing error in the determination by the Bureau of Land Management that the land in the protested public land survey derives from an island formed in the Yellowstone River prior to the date of Montana statehood, November 8, 1889."

After a number of continuances, a hearing was held October 19, 1976, at Miles City, Montana, before Administrative Law Judge Harvey C. Sweitzer. A copy of his recommended decision is attached hereto as Appendix A. Judge Sweitzer found that appellants had failed to satisfy the burden of showing error in BLM's determination and accordingly recommended that the protest of Sobotka and Tomalino be dismissed.

Copies of the recommended decision were served on counsel for the appellants and for the respondent. A response was filed only by counsel for the appellants. Therein, counsel made the following objections:

1. The transcript of the hearing was unsatisfactory because of misnumbered pages and garbled and mistranscribed testimony to the prejudice of appellants;

2. The Judge committed prejudicial error in refusing to grant appellants' motion to reopen the hearing for submission of photographs of a tree allegedly felled by BLM personnel and relied upon by the Judge in reaching his recommended decision;

3. The Judge had no factual basis for his conclusion that the bulk of the disputed land was an island or islands at the time Montana became a State in 1889;

4. The Judge ignored the plat of a survey conducted in 1883 by Elmer C. Towne which did not show any islands above mean high water mark in sec. 20, the location of the disputed lands;

5. The Judge relied upon the plats of a map made in 1878 by Lt. Edward Maguire of the Corps of Engineers while conducting a reconnaissance of the Yellowstone River, which map depicts landforms with permanent vegetation in the area of sec. 20, as returned in the Towne survey;

6. The Judge's findings of fact are based more on conjecture and speculation than on hard physical facts;

7. The Judge erred in not accepting the failure of Towne to survey an island in sec. 20 as conclusive evidence that no island existed there in 1883; and

8. The Judge should have given greater weight to the action of Dawson County in placing the disputed lands on its tax rolls in 1963 and to the language in a pertinent deed, issued in 1914, which purported to convey both the surveyed land in sec. 20 and certain lands accreted thereto.

We shall address these objections in order.

Following the hearing before Judge Sweitzer, corrections to the transcript were stipulated by counsel for appellants and the BLM. We perceive no prejudice to appellants from the state of the transcript, either before or after the corrections were made.

The motion referred to in appellants' second argument on appeal was a motion to introduce photographs, taken some weeks after the hearing, to show that a tree, upon which the Government allegedly relied to determine the age of the disputed lands, had drifted onto the landform during a high water period and had not arisen on the site where it had been felled. Respondent BLM objected to the motion claiming that the proffered photographs were not of the same tree as depicted in appellants' Exhibit G and respondent's Exhibit 29. The Judge denied the motion, correctly we believe, for the reason that there was not a sufficient showing that the photographs would be probative of any issue in the case.

Five of the objections raised by appellants relate to the heart of the dispute, i.e., whether lands claimed by appellants in sec. 20 derive from an island or islands formed in the Yellowstone River prior to Montana statehood, November 8, 1889. If so, the Yellowstone

River being a navigable river as of the date of statehood, the land remains the property of the United States. Appellants contend generally that Judge Sweitzer based his conclusions more on conjecture and speculation than on hard physical facts.

The field notes of the Towne survey recite the presence of a "sand island" in the Yellowstone River facing sec. 20, and a landform, albeit unsurveyed, resembling the disputed lands does appear as an island on the plat itself. It is suggested by appellants that if an "island" had existed at the time of Towne's survey in 1883, Towne surely would have followed his instructions to subdivide the "island," as he did with Chromo Island in secs. 1 and 2 and Blood Island in secs. 29 and 30. We point out that each of these surveyed islands was crossed by a regular section line of the Towne survey. Upon examination of many other township plats involving the navigable Yellowstone River and other rivers in the public land states, we note that contract cadastral surveyors during the period in question, 1880-1890, not infrequently neglected to survey an island in a navigable stream where such island was not crossed by a section line. Whatever the reason for the failure of Towne to survey the "island," his failure to extend the Government survey over "sand island" did not remove it from the public domain and Government ownership. In Scott v. Lattig, 227 U.S. 229 (1913), the Supreme Court held that an error in omitting to survey an island in a navigable stream does not divest the United States of title or interpose any obstacle to surveying it at a later time. An island within the public domain in a navigable stream and actually in existence both at the time of the survey of the banks of the stream and also upon the admission to the Union of the State within which it is situated remains the property of the United States. Even though omitted from the survey, such land does not become part of the fractional subdivisions on the opposite banks of the stream. See also Moss v. Ramey, 239 U.S. 538 (1916).

We look now at the evidence introduced by the Government in support of its assertion that an island existed in the Yellowstone River facing sec. 20 in 1883 at the time of the Towne survey and in 1889, the date of Montana statehood. The 1878 topographic survey of the Yellowstone River by Lt. Edward Maguire, Corps of Engineers, was undertaken to ascertain the navigability of the river. His depiction of islands or other landforms in the river necessarily had to be reasonably precise or his work would have been meaningless. The Administrative Law Judge, in our opinion, did not give undue weight to the Maguire map of 1878, which definitely shows the presence of islands or landforms in the area which Towne later surveyed as sec. 20. Symbols used by Maguire indicate that the islands were covered by vegetation, including trees.

In 1967, BLM cut several trees from the disputed lands and submitted selected samples for age determination. The oldest of these samples was determined to be a minimum of 82 years. By this test,

BLM sought to prove that the land supporting this tree had been formed at least 82 years prior to 1967, i.e., by 1885. BLM then offered expert testimony that the entire life of this tree had been on relatively dry land or land only occasionally overflowed.

Evidence was also offered by the Government of the Federal grazing lease covering the disputed lands which appellant Sobotka and his predecessor in interest had maintained. The use of the "island" under a Federal grazing lease by the predecessor of Sobotka as well as by Sobotka himself was offered as tacit acknowledgment of the Federal title to the land. It is conceded that in recent years Sobotka has paid his grazing rentals under protest.

The evidence assembled by appellants consisted chiefly of their testimony that they had purchased surveyed land in sec. 20 and had assumed the transaction included the disputed lands on the Yellowstone River. Subsequent to their purchase of the surveyed land, appellants obtained a quit claim deed from their grantor in 1967, purporting to convey all accreted land in sec. 20 between the meander line of their fee land and the low water mark of the Yellowstone River. Appellants also testified that they believed that the land described in their Federal grazing lease was an island presently offshore in the Yellowstone River.

Appellants attack the Judge's decision as being based on conjecture and speculation. We cannot agree that the Judge's conclusion is not supported by the evidence in the record before us. We find that the weight of the evidence supports the Judge's conclusion. Although there was no positive direct evidence of the physical condition of the island in 1889, inferences can be drawn from evidence in the record that the island was fast land at that time.

Appellant's final contention on appeal is that the Judge should have placed greater weight in the action by Dawson County in 1963 to place the disputed area on its tax rolls. This argument is easily disposed of. Public lands owned by the United States cannot be subjected to taxation by the State in which they are located. Trimble v. Seattle, 231 U.S. 683 (1914). When Congress has prescribed the conditions upon which portions of the public domain may be alienated and has provided that upon fulfillment of the conditions the United States shall issue patent, the land becomes taxable only after the applicant has fulfilled all conditions 1/ precedent to such conveyance. Cf. Hussman v. Dunham, 165 U.S. 144 (1897). The fact

1/ But see 43 U.S.C. §§ 455, 455a (1976), allowing state taxation of reclamation homesteads where only acceptable regular homestead proof has been submitted and desert land entries in reclamation projects which have been furnished with water from the project.

taxes are erroneously assessed by a state and paid does not afford a taxpayer any rights against the United States unless specifically provided by Federal statute. An example of Federal consideration of tax payments is provided by the Color of Title Act, 43 U.S.C. § 1068 (1976). We have reviewed the entire record and find that Judge Sweitzer's recommended decision is a proper finding based on that record.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Chief, Division of Cadastral Survey, BLM, dismissing the protest by August Sobotka and Joseph Tomalino of the proposed land survey of a landform in sec. 20 and 21, T. 18 N., R. 57 E., principal meridian, Montana, is affirmed. Objections to the recommended decision of Administrative Law Judge Sweitzer are overruled.

Douglas E. Henriques
Administrative Judge

We concur:
Frederick Fishman
Administrative Judge

Joan B. Thompson
Administrative Judg

January 12, 1979

AUGUST SOBOTKA	:	MONTANA GROUP 543
JOSEPH TOMALINO	:	
	:	
Appellants	:	Involving protest to Survey
	:	of Area in Secs. 20
v.	:	and 21, T. 18 N., R. 57
	:	E., Principal Meridian,
BUREAU OF LAND MANAGEMENT	:	Dawson County, Montana.
	:	
Respondent	:	

RECOMMENDED DECISION

Appearances: John R. Carr, Esq., Miles City, Montana, for Appellants;
Edward F. Bartlett, Esq., Office of the Solicitor, U.S. Department of the Interior, Billings, Montana.
Before: Administrative Law Judge Sweitzer.

By Order of August 18, 1971, the Interior Board of Land Appeals considered the appeal of August Sobotka and Joseph Tomalino following a dismissal by the Chief, Division of Cadastral Survey, Bureau of Land Management, of their protest against the proposed public land survey of a landform in Sections 20 and 21, T. 18 N., R. 57 E., P.M., Montana. The disputed landform is claimed by Appellants on the basis

of accretion to their patented lands on the north bank of the Yellowstone River. The Respondent contends that the bulk of the disputed lands existed as an island or islands at the time Montana became a state and hence is public land despite the fact that there is no longer a stream channel separating the landform from the Appellants' private lands. There is no question that if the landform can be properly characterized as being in existence as an island on November 8, 1889, the date of Montana statehood, the landform is public land of the United States.

The Board directed a hearing pursuant to 43 CFR 4.415 to allow the Appellants an opportunity to present testimony and evidence as to the formation and geology of the landform in question. The Appellants "have the burden of showing error in the determination by the Bureau of Land Management that the land in the protested public land survey derives from an island formed in the Yellowstone River prior to the date of Montana statehood, November 8, 1889." IBLA 70-44.

Subsequent to the Order, extended continuances of the scheduled hearing were requested and granted pending efforts to resolve the dispute through remedial legislation instituted

by United States Congressional delegates from the State of Montana. Such efforts were apparently fruitless and a hearing was eventually held and posthearing briefs were filed by the parties.

DISCUSSION

It appears uncontradicted on the record that Mr. and Mrs. Sobotka and Mr. and Mrs. Tomalino purchased Lots 1, 2, 3, 4 and 5, Section 20, T. 18 N., R. 57 E., P.M., Montana, from Mr. William Willot in 1961. Evidently Appellants assumed that their title included the disputed lands. At some time prior to 1967, Appellants became aware that the disputed lands were claimed by the Federal Government and they thereafter paid "under protest" for a license to graze the lands.

In an apparent effort to strengthen their chain of title to the lands, Appellants obtained on November 7, 1967, a quit-claim deed from Mr. Willot which purported to convey "all accreted land in said Section 20 between the meander line of Lots one (1), Two (2), Three (3), Four (4) and Five (5) in said section and the low water mark of the Yellowstone River."

In 1967, Richard L. Larimer, Bureau of Land Management Cadastral Surveyor, was directed to make an investigation of the disputed land to determine its status. He conducted the investigation by studying maps, charts and aerial photographs, the original survey field notes and plats, and, by conducting a physical examination of the land in the fall of 1967. His report dated October 5, 1967 (Ex. 1) concluded that the island existed at time of statehood. His conclusion was based in part on the following evidence:

1. A map from the survey conducted in 1878 by Lt. McGuire, U.S. Army Corps of Engineers, shows that a group of islands existed within the boundaries of the disputed landform with vegetation and hachure symbols indicating that the lands protruded above mean high water mark for at least a substantial portion of the year.

2. The soil from the disputed land and the mainland was similar.

3. A survey conducted by Towne in 1883 mentioned a "sand island" off the shore in describing the calls during the survey of the meander line of the left bank of the Yellowstone River.

4. A "readily apparent channel" can still be seen which confirms that the land is not an accretion in the sense of a gradual build up along the left bank.

5. The existence of old trees on the disputed area.

Following this investigation, special instructions were issued to conduct a dependent resurvey of a portion of the subdivisional lines. Mr. Larimer conducted the survey and described the disputed lands as Lots 7, 8, 9 and 10, in Section 20, consisting of about 181.50 acres, and Lot 6, in Section 21, consisting of about 21.31 acres. Thus, the total disputed area is 202.81 acres.

Mr. Donald W. Lewis, Project Scientist at the U.S. Forest Products Laboratory in Madison, Wisconsin, testified as an expert concerning the age determination of trees. He conducted an examination of cross-sections of trees taken from the disputed land. When asked what type of terrain one of the trees grew on, Mr. Lewis answered:

> The only comment I could make along that line and it's from a forestry background is that cottonwood cannot grow under water. It can grow in areas that are occasionally flooded but if it's under

> water a good percentage, it could not survive, so it must have been in some type of reasonable [sic] dry land. (Tr. 244)

Mr. Lewis discounted the possibility of the tree having started to grow elsewhere and to have somehow been transplanted on the island. He stated that the likelihood of the tree being transplanted in a vertical position would be "about equivalent to a meteor coming through the courthouse right at this moment." (Tr. 245) He related that a cross-section was taken from a vertical section of the tree and had the tree been a transplant, its age reflected in the cross-section would reflect the time since the transplant -- in this case at least 82 years. (See Ex. 29; Tr. 240, 245-52.) From this evidence, it appears unrebutted that some portion of land supporting the above-mentioned tree has existed above the mean high water mark for at least 82 years prior to the date when the tree was cut in 1967.

By their brief, Appellants argue that the government has the burden of establishing that the disputed land existed as a single island at statehood. (See App. Brief at 15.) Such an argument is a mischaracterization of the law. Islands in existence at the time of statehood, whether surveyed or not, remain public lands of the United States. Scott v. Lattig, 227 U.S. 229 (1913). Title to such lands

remains in the United States subject to survey despite disappearance of the channel separating the land from the surveyed lots. United States v. Severson, 447 F.2d 631 (7th Cir. 1971). It does not help Appellants' case if the disputed landform was several small islands separated by braided channels -- as indicated by the McGuire survey -- or a single island.

Appellants raise many questions which tend to dispute the inferences that may be drawn from the unrebutted facts relied upon by the government.

First, the land described as an island was not surveyed in 1883 by Towne. If it were in fact an island, Towne was required by his contract with the U.S. Government to survey it. There is no dispute as to the requirement to perform the survey nor the failure to survey the island if it in fact existed as such. (See Tr. 177.) Appellants urge that the islands were omitted because the traditional low water in August must have indicated to the surveyor that the "sand island" referred to in the notes would not have extended above the mean high water mark. Respondent, however, does not attach much significance to the omission. Mr. Larimer speculated that the island (or islands) may

have been omitted from the survey because, considered too small to be worth the effort (Tr. 198), 1/ they were too overgrown with brush (Tr. 198), or that there was an ambiguity in the instructions (see Tr. 197).

In any case it appears that islands known to have been in existence through geographical, biological, or other conclusive evidence were often omitted by official surveys. Thus the U.S. Supreme Court found in Scott v. Lattig, supra, that omission from a survey of an island did not overcome other credible evidence as to the fact of an island's existence at time of statehood. 227 U.S. 229 (1913). The Court held further that such omission "did not divest the United States of the title, or interpose any obstacle to surveying it at a later time." Id at 241-42. The U.S. Court of Appeals for the Ninth Circuit overturned a District Court finding that relied heavily on the omission of three islands from a survey of public lands in Idaho. The Court found that the fact of omission was inadequate evidence -- in light of other evidence -- to conclude that the islands did not exist on admission of Idaho to the Union.

1/ Several pages of the transcript were misnumbered. Pursuant to stipulation of the parties, an Order corrected the pagination and other transcript errors. All references herein are to the corrected pages.

Ritter v. Morton, 513 F.2d 942 (9th Cir. 1975). Accordingly, in the instant case, the omission of the lands in the survey is far from conclusive as to whether the lands existed prior to statehood.

Appellants point to the omission of the lands on the Master Title Plats to show that the lands were not recognized by the Bureau of Land Management as part of the public domain. Respondent points out, however, that the Master Title Plats reflect only data from officially filed surveys. The only such survey existing to date is the Towne survey and Towne's omission would necessarily result in omission on the Master Title Plats. 2/

Appellants additionally argue that the BLM grazing lease records indicate that the government did not claim the land until the Appellants purchased the land in 1961. (See App. Br. p. 10.) However, a Ten Year Grazing Permit issued to Mr. William Willot and dated December 22, 1958, indicates the land in question was considered public land on the date of December 2, 1958, when an attached sketch was apparently

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2/ The latest survey conducted by Mr. Larimer cannot be added to the official record until filed. Although it has been approved by the proper authorities, it has not been filed because of the current dispute.

made. (Ex. 26.) Appellants argue that the land depicted on the sketch is a presently existing island but both the size and location of the designated federal range more closely describe the disputed land than the smaller island existing to the south. In spite of the reference on the first page of the document to the lands as an "island," the sketch shows what appears to be an abandoned channel to the north of the island which corresponds to the current configuration of the land.

Appellants also point out that county officials added the area under dispute to the tax rolls in 1963 upon the assumption that the lands are in fact accreted. Mr. Malcolm L. Graves, county appraiser, testified that the records indicate that 229.83 acres were classified as "bottom lands of some development." (See Tr. 25, 31.) Despite the undisputed fact that the lands were assessed as private lands, there is no evidence as to how and why the county came to classify them as such. Mr. Graves stated that the determination did not involve an investigation or other procedures. (Tr. 32.) Apparently the decision involved a comparison of the Towne survey of 1883 and the present condition of the land. (Tr. 33.) Hence, the county determination is entirely dependent on the interpretation of the

significance of the omission by Towne. Thus there can be no more significance attached to the fact of assessment than can be attached to the Towne survey itself. In any case, the mere act of placing property on the tax rolls by county officials would not deprive the United States of property.

Appellants argue that equity requires that the Respondent's claim to the land be denied. (App. Br. p. 15.) The equity argument by brief and at hearing appears to be based not only on the evidence relating to the principal issue, but also on asserted mistake as to which lands were included in the purchase from Mr. Willot and the apparent ease by which Appellants could manage the property due to their ownership of all of the surrounding land. As to any mistake in the purchase of the property, a simple examination of the chain of title should have revealed the omission of over 200 acres in the conveyance of those lots found in Sections 20 and 21. Although the Appellants may well be in a better practical position than is the Respondent to manage the property, this has no bearing on the pivotal issue involved here, that is, whether or not the land was in existence as an island at the time of Montana statehood. 3/

3/ Such facts as ownership of adjacent land might be pertinent regarding laws under which government land may be acquired.

FINDINGS OF FACT

In accordance with the Order of the Interior Board of Land Appeals and 43 CFR 4.439, the following proposed findings of fact are submitted.

1. One or more small islands within the boundaries of the disputed landform existed in 1878, the year of the McGuire survey.

2. A "sand island" was observed in the area of the landform by Towne in 1883.
3. In spite of his observation of the "sand island," Towne did not survey any island within the area of the disputed land. The reason for this apparent omission is unknown.

4. At least a portion of the disputed land existed above the mean high water mark in 1885 as evidenced by the determined age and appearance of a tree cut in 1967.

5. Between 1878 and the present, a single landform has emerged which has become part of the left bank of the Yellowstone River. This has evidently occurred as a result

of the shifting of the river southward resulting from accretion to the small islands and the disappearance of channels separating the small islands from themselves and from the mainland.

6. Based on the preceding findings, and reasonable inferences therefrom, the preponderance of the evidence indicates that at least certain small islands in the disputed area existed above the mean high water mark at the date of Montana statehood.

7. The subject survey reasonably delineates the boundary between Appellants' and Respondent's lands.

CONCLUSION

Based upon the foregoing proposed findings, it is concluded that Appellants failed to satisfy their burden of showing error in the determination by the Bureau of Land Management that the land in the protested public land survey derives from an island formed in the Yellowstone River prior to the date of Montana statehood, November 8, 1889. Accordingly, it is recommended the protest be dismissed.

Harvey C. Sweitzer
Administrative Law Judge